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ATTORNEYS FOR INDIANA'S ENVIRONMENT

November 22, 2010

Mr. John Hale
Indiana Department of Environmental Management
Office of Land Quality - Solid Waste Permits Section
100 North Senate Avenue
Indianapolis, IN 46204

RE: Soil Solutions Solid Waste Processing Permit 20-12

Dear Mr. Hale,

Please be advised that I represent more than 150 residents who live in close proximity to the VIM Recycling facility in Elkhart, Indiana where Soil Solutions intends to continue processing solid waste. These residents have been adversely impacted by VIM's operations for years and they will continue to be harmed if the proposed solid waste permit is issued to Soil Solutions. Having reviewed Soil Solutions permit application and supporting documents, I urge IDEM to deny the permit application for the following reasons:

I. The permit application should be denied pursuant to Indiana's good character law

IDEM should deny Soil Solutions' permit application pursuant to Indiana Code § 13-19-4-5 which allows IDEM to "deny an application for the issuance, transfer, or major modification of a permit for a solid waste processing facility" if:

"(1) the applicant or a responsible party has intentionally misrepresented or concealed any material fact in a statement required by section 2 or 3 [IC 13-19-4-2 or IC 13-19-4-3] of this chapter;

(2) a civil or administrative complaint described in section 3(a)(3) [IC 13-19-4-3(a)(3)] of this chapter has been filed against the applicant or a responsible party within five (5) years before the date of submission of the application;

[and/or] . . .

(5) the applicant or a responsible party has knowingly and repeatedly violated any state or federal environmental protection laws."

Indiana Code § 13-19-4-5.

In turn, 329 IAC 10-11-1 directs IDEM to deny a solid waste permit application if "the applicant is, at the time of the application or permit decision, not in compliance with the Environmental Protection Acts or regulations promulgated thereunder, or has a history of repeated violations of the Acts or regulations or material permit conditions that evidence an inability or unwillingness to comply with requirements of this article (329 IAC 10) or a facility permit. All of these factors are present here and provide sufficient grounds for IDEM to deny Soil Solutions' application or a solid waste processing permit.

a. Soil Solutions has misrepresented and/or concealed a material fact

Soil Solutions' permit application should be denied under Indiana Code § 13-19-4-5(a)(1) because Soil Solutions has "intentionally misrepresented or concealed" the material fact that Kenneth R. Will, owner of VIM Recycling, Inc. and K.C. Industries, LLC is and will continue to be a "responsible party" upon issuance of a permit to Soil Solutions. By concealing this fact, Soil Solutions and Ken Will are attempting to side-step Indiana' good character disclosure requirements because they know that Ken Will's demonstrated "bad character" provides more than sufficient grounds to deny Soil Solutions' permit application.

Specifically, a "responsible party" includes "an officer, a corporation director, or a senior management official of a corporation, partnership, limited liability company, or business association that is an applicant or an individual, a corporation, a limited liability company, a partnership, or a business association that owns, directly *or indirectly*, at least a twenty percent (20%) interest in the applicant." Ind. Code § 13-11-2-191 (emphasis added).

To avoid naming Ken Will as a "responsible party," Soil Solutions claims that "Mr. Will will step down as owner/operator of the facility."¹ Nevertheless, Ken Will will maintain ownership of the land² and Soil Solutions admits that Ken Will "may act in a consulting capacity to get operations, customer management, and accounting up to speed."³ Accordingly, even if Ken Will "steps down as owner/operator of the facility," he remains "liable [as the landowner] for any environmental harm caused by the facility." 329 IAC 11-11-4. In addition, he will continue to receive \$25,000 per month (\$300,000/year) under the land lease agreement⁴ that Soil Solutions will maintain with K.C. Industries, LLC.⁵

¹ Soil Solutions permit application cover letter to IDEM, p. 2 (July 14, 2010).

² Permit Application, Section G - Signatures and Certification Statements (Ken Will, as owner of K.C. Industries, LLC is identified as the "landowner" with responsibilities under 329 IAC 11-11-4)

³ Soil Solutions permit application cover letter to IDEM at 2.

⁴ See Lease Agreement between VIM Recycling, Inc. and KC Industries, LLC, Section 3.Rent.

⁵ See Soil Solutions' "Notice of Intent for the Transfer of Operations and Assets" (stating the goal of the agreement "is the immediate transfer of operational activities and assets at VIM's Elkhart site . . . from VIM to SSCo . . . includ[ing] the transfer of the current land lease agreement with KC Industries, LLC from VIM to SSCo.")

Thus, Ken Will will be involved in Soil Solutions' "operations, customer management and accounting" even after the permit is issued, he will remain liable for any harm caused by Soil Solutions' operations, and he will maintain a significant financial interest in Soil Solutions' operations. Indeed, for Ken Will to have less than a 20% interest in Soil Solutions' operations at VIM's Elkhart site, Soil Solutions will have to earn more than \$1.5 million dollars per year from those operations. Clearly, Ken Will is a "responsible party" and subject to Indiana's good character disclosure requirements. The fact that IDEM required Dan Plant to be listed as "responsible party" merely because he "prepared the [permit] application" underscores this fact.

b. Numerous civil and administrative complaints as contemplated by Ind. Code § 13-19-4-3(a)(3) have been filed against Ken Will within the last five (5) years and Ken Will has knowingly and repeatedly violated environmental laws.

As discussed above, Ken Will is a "responsible party" whose involvement should have been disclosed by Soil Solutions in its application for a solid waste processing permit. As such, Soil Solutions' permit application should be denied pursuant to Ind. Code § 13-19-4-5(a)(2) because numerous civil and administrative complaints as contemplated by Ind. Code § 13-19-4-3(a)(3) have been filed against VIM Recycling, Inc. and/or Ken Will within the last five (5) years as follows:

Comm'r IDEM v. VIM Recycling, Inc., Elkhart Circuit Court No: 20C01-0810PL-076

Johnson, IN State Fire Marshal v. VIM Recycling, Inc., et. al., Elkhart Circuit Court No: 20C01-0802PL-015

U.S. EPA v. VIM Recycling, Inc., NOV No. EPA-5-09-IN-12 and ACO No. EPA-5-09-113(a)-IN-05

Comm'r IDEM v. VIM Recycling, Inc., et. al., Kosciusko Circuit Court No: 43C01-0902-PL-107

Attorney General of the State of Indiana v. VIM Recycling, Inc., Elkhart Superior Court No: 20D01-0912-CC-619

Adkins, et. al. v. VIM Recycling, Inc., et. al., U.S. District Court for the Northern District of Indiana, No. 3:09-cv-00510

Adkins, et. al. v. VIM Recycling, Inc., et al., 7th Circuit Court of Appeals No: 10-2237

Adkins, et. al. v. VIM Recycling, Inc., et. al., Elkhart Circuit Court No. 20D01-1005-CT-38

The basis for the foregoing administrative and civil actions against VIM Recycling, Inc. regardless of whether Ken Will is named directly, are Ken Will's intentional and repeated violations of state and federal environmental protection, health and safety laws which also provide grounds for IDEM to deny the permit application of Soil Solutions. *See IDEM v. Boon*

County Resource Recovery Systems, Inc., 803 N.E.2d 267, 275 (noting that "a corporation's violations of environmental law can be attributed to its responsible parties in the context of Indiana Code Section 13-19-4-5(a)(5))."

In the interest of brevity, the undersigned directs IDEM to conduct even a cursory review of its own file on VIM Recycling which documents more than a decade of Ken Will's repeated and willful violations of Indiana's environmental laws that apply to the VIM Elkhart site. One such document is the Indiana Attorney General's verified pleading filed in Elkhart Superior Court against VIM Recycling, Inc. which states that: 1) IDEM has "reason to believe that [VIM] will not correct the [environmental] violations without court action;" 2) that VIM's "continuing violations and failure to cooperate with IDEM officials indicate a pattern of non-compliance, which must be abated to prevent further actual and potential damage to public health and the environment;" and 3) that "unless enjoined by the Court, [IDEM] believes that VIM will continue to violate the applicable environmental laws and rules, which will result in immediate and irreparable harm to the air, water, and land in and around the Site, to IDEM, and to the citizens of Indiana."⁶

Moreover, at the public hearing on Soil Solutions' permit application, the undersigned discussed and submitted a small portion of IDEM's file to demonstrate Ken Will's contempt for environmental statutes, rules and regulations for nearly twenty (20) years that have resulted in the deaths of two VIM employees, serious injury to another employee, and immense suffering imposed on communities surrounding VIM sites in Elkhart, Goshen and Warsaw.

As explained by the Indiana Court of Appeals in *IDEM v. Boone County Resource Recovery Systems*, "given public policy considerations, chronic environmental law violators should be prevented from evading regulation merely by acting through different corporate entities." 803 N.E.2d at 275. The court's reasoning is most applicable to this matter given that Ken Will, a "chronic environmental law violator," is attempting to evade regulation and obtain a solid waste processing permit that he is not otherwise able to obtain. Gaming the system in this way sets a dangerous precedent for other chronic violators to follow. Moreover, justice screams for IDEM to prevent Ken Will from profiting off of an open dump that he created by conveniently claiming his "intent" to relinquish control of the dump to Soil Solutions⁷.

II. IDEM should not issue a permit for solid waste processing at the VIM Elkhart site until all outstanding solid waste violations which are the subject of pending IDEM and citizen enforcement actions are resolved.

As stated above, IDEM is pursuing several enforcement actions against VIM Recycling, Inc. for violating Indiana's solid waste management laws. Two of IDEM's actions pertain to solid waste violations at the VIM Elkhart site including but not limited to open dumping of B and C wastes at the site. In addition, impacted residents are engaged in a RCRA citizen suit pursuant to

⁶ *Verified Complaint for Preliminary and Permanent Injunction and for Civil Penalties, Attorney General v. VIM Recycling, Inc.*, Elkhart Superior Court No. 20D01-0912-CC-619. (Dec. 2009)

⁷ Reference to the "Notice of Intent" to transfer VIM's "operations and assets" to Soil Solutions. IDEM is reminded that Ken Will has asserted his "intent" to comply with various deadlines and requirements for years without ever doing so. Indeed, Mike Aylesworth referred to Ken Will as a "scofflaw" for his failure to abide with IDEM's directives and timelines.

42 U.S.C. § 6972(a)(1)(A) and (B) against VIM Recycling for violating RCRA (including Indiana's solid waste management laws enacted pursuant to RCRA) and for creating an "imminent and substantial endangerment to health and the environment" at the VIM Elkhart site. IDEM's actions seek removal of all open dumped "B" and "C" wastes. The residents' citizen suit seeks to enjoin all solid waste activities at the VIM Elkhart site which include open dumping, storage, stockpiling and grinding, shifting, handling and processing of A, B and C wastes, construction and demolition wastes, gypsum, particle board, and bio-solids - the very activities to be permitted according to Soil Solutions' application.

Ken Will should not be allowed to evade the consequences for intentionally and repeatedly violating environmental laws for more than a decade simply because he now intends to transfer control of VIM's operations to Soil Solutions. Indeed, the law in other related contexts would prohibit such an unjust result. *See Gray v. Westinghouse Elec. Corp.*, 624 N.E.2d 49 (Ind. App. 1993) (holding that a defendant corporation that dumped PCBs and other toxics on property it did not own could still be held liable for creating a nuisance because a party which causes a nuisance can be held liable regardless of the ownership, license or tenancy status or whether the party owns or possesses the property on which the nuisance originates.)

IDEM clearly understands the unjust nature of allowing an environmental law violator to avoid the consequences of committing those violations through a mere transfer of property. For example, the Agreed Order entered into between IDEM and VIM Recycling, Inc. on January 16, 2007 (AO) expressly states that "no change in ownership, corporate or partnership status of the Respondent shall in any way alter its status or responsibilities under this Agreed Order."⁸ Pursuant to this provision, Ken Will and VIM Recycling, Inc. are obligated to comply with the AO's provisions regardless of any sale of "assets and operations" to Soil Solutions.

The AO requires Ken Will and VIM to, among other things, remove and properly dispose of all "C" waste at the site by September 30, 2008. When Ken Will failed to comply, IDEM brought an enforcement action in Elkhart Circuit Court, which is still pending, and which seeks civil penalties and compliance with the AO in all respects.⁹ Accordingly, all C waste must be removed from the VIM Elkhart site and other requirements of the AO must be complied with before Ken Will, VIM, Soil Solutions or any other company is issued a solid waste processing permit for operations at the site.

More directly related to the activities which Soil Solutions is seeking a permit, i.e. to grind and process "B" waste at the VIM Elkhart site, IDEM brought an enforcement action against VIM in December of 2009 to "immediately cease to cause or allow the deposit and/or dumping of contaminants and solid waste," and to remove all "B" grade wastes from the VIM Elkhart site.¹⁰ Specifically, the Indiana Attorney General alleged that VIM has disposed of B waste "in a manner which creates a threat to human health or the environment, and has the

⁸ Agreed Order No. 2006-15827-S, Section II(18) (Jan. 16, 2007).

⁹ Verified Petition for Civil Enforcement, IDEM v. VIM Recycling, Inc., Elkhart Circuit Court No: 20C01-0810PL-076 (Oct. 2008)

¹⁰ Verified Complaint for Preliminary and Permanent Injunction and for Civil Penalties, Attorney General v. VIM Recycling, Inc., Elkhart Superior Court No. 20D01-0912-CC-619. (Dec. 2009)

potential to create a fire hazard," and that the open dumping of B waste "continues to pose a substantial, immediate, and irreparable threat to the environment and the public."¹¹

How can IDEM even consider permitting any entity to conduct an activity which IDEM is currently seeking to enjoin in an ongoing lawsuit? Moreover, how can IDEM consider allowing any entity to bring more "B" waste to the site for processing when IDEM has declared in a verified court document that such activity continues to pose "a substantial, immediate and irreparable threat" to the environment and public? At a minimum, "B" and "C" wastes must be removed and related legal issues in pending lawsuits must be resolved before IDEM grants a permit directly contradicting and undermining its own position and which allows the prohibited activities to continue.

Pursuant to 329 IAC 10-11-1 IDEM may deny a solid waste permit application if "the applicant is, at the time of the . . . *permit decision*, not in compliance with the Environmental Protection Acts or regulations promulgated thereunder." Here, if IDEM grants Soil Solutions' permit application without first requiring full clean up of all open dumped wastes at the site, then Soil Solutions will be the new, proud owners of the open dump that VIM created. As such Soil Solutions will also be responsible for maintaining and contributing to an open dump - an enforceable, ongoing violation - and sufficient grounds to deny the permit application.

III. The VIM Elkhart site is not in compliance with all applicable zoning requirements

329 IAC 11-9-2, requires Soil Solutions to demonstrate that the facility site is in compliance with all applicable zoning requirements. On September 2, 2008, the Elkhart County Commissioners approved a Detailed Planned Unit Development for the VIM Elkhart site.¹² A simple site visit reveals that the following provisions of the DPUD have not been complied with:

Section 9(2) - storage pile height restrictions have been exceeded and berms have not been "planted, seeded, and maintained with sustained arborvitae growth."

Section 9(3) - a commercial driveway permit has not been bonded and obtained

Section 9(6) - northern and western berms have not been constructed, planted and seeded

Section 9(10) - an exterior access road around the site has not been maintained for fire protection and waste piles have not been separated as required by the State Fire Marshall.

The VIM site is not in compliance with all phases of the five year site plan that VIM applied for and agreed to undertake including:

1. failure to construct an asphalt pad for storing raw materials and finished goods;
2. failure to construct a 20' emergency access road
3. failure to construct swales between the access road and berms to handle drainage needs
4. failure to connect the east and west retention areas with a subsurface pipe

¹¹ *Id.* at 5.

¹² Elkhart County Ordinance No. PC08-11

5. failure to expand the capacity of the existing retention pond
6. failure to create a new southwestern retention area

The site is not in compliance with all applicable zoning requirements yet Soil Solutions misrepresented that it is. Accordingly, IDEM should deny the permit application for both reasons.

IV. The permit application does not adequately address stormwater, leachate from berms and open dumped wastes, odors and fumes, and proper management of outdoor "storage areas" as required by 329 IAC 11-9-2

Soil Solutions' permit application does not provide any plan for dealing with fugitive dust, leachate, or controlling stormwater run-off, odors, fumes and vectors from outdoor storage of wastes. Rather, Soil Solutions asserts without any evidence whatsoever that "outdoor storage will not produce dust since the processing of the materials will not take place outdoors, . . . will not produce its own run off since the B wood will all be coming in dry [and] any odors associated with the site have been related to decomposition of other organic matter and gypsum, not fresh B wood." Not only does the long history at this site demonstrate otherwise, but this unsupported, self-serving statement is not sufficient to relieve Soil Solutions from having to describe its planned procedures for controlling dust, noise, spills, odors, and fumes "at all times at the facility so that they do not constitute a nuisance or a health hazard" as required by 329 IAC 11-9-2. Moreover, the VIM Elkhart site is not in compliance with stormwater requirements in 327 IAC 15-5 and 6 and a waste analysis was not submitted with the application.

Conclusion

There are numerous additional problems, inconsistencies and deficiencies with Soil Solutions' permit application that are not addressed in these comments. With more time I would fully comment on issues related to VIM's unpermitted grinding equipment, the lack of description, analysis and proper management of waste streams, fire prevention, removal of existing open dumped "B" and "C" piles, lack of compliance with State Fire Marshall requirements, other solid waste approvals that are needed such as a legitimate use authorization for animal bedding and marketing/distribution approvals for other proposed products. Nevertheless, the foregoing reasons which I have discussed in these comments provide a sufficient basis for IDEM to deny the permit application submitted by Soil Solutions. Therefore, I respectfully request on behalf of my clients, that IDEM deny Soil Solutions request for a Solid Waste Processing Facility Permit for the VIM Elkhart site.

Thank you for your attention and consideration.

Very truly yours,

LEGAL ENVIRONMENTAL AID FOUNDATION


Kim E. Ferraro